SEP 12

HAROLD B. WILL

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 387

MARK GARNON,
Petitioner,

VERSUS

W. R. BRITTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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In the
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OCTOBER TERM, 1954

No. .....

MARK GANNON,
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VERSUS

W. R. BRITTON,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable Supreme Court of the United States:

NOTE: Reference to the record, as used in this petition, (R. __) refers to the page of the typewritten record, certified by the Clerk of the Supreme Court of the State of Oklahoma, and filed herewith.

Your petitioner, Mark Gannon, most respectfully prays this Honorable Court that the writ of certiorari be granted to review the proceedings had and the final decision of the Supreme Court of the State of Oklahoma, in a certain case pending in that court, styled and numbered, "W. R. Britton, Plaintiff in Error, v. Mark Gannon, Defendant in Error, No. 36,249," wherein your petitioner was defendant in error, and the respondent was plaintiff in

error, and respecting such proceedings and final decisions, your petitioner respectfully represents and shows:

(a) REPORTS OF OPINION DELIVERED BELOW

It is sought hereby to obtain a review of the decision and judgment of the Supreme Court of the State of Oklahoma, rendered on the 3rd day of May, 1955, in said Case No. 36249 in said court, and the decision of such Supreme Court of Oklahoma, made on the 21st day of June, 1955, denying petitioner's petition for rehearing in that court (R. 254-A), which petition for rehearing had been filed within the time allowed by the rules of that court (R. 252). The opinion of the Supreme Court of Oklahoma in such case, was written by JUSTICE ARNOLD, and is reported in The Journal, published by the Oklahoma Bar Association, Volume 26, page 761, under date of May 7, 1955, and in 285 Pacific Reporter, 2nd, page 407 (advance sheets). Said opinion appears in the typewritten certified transcript of record filed herewith (R. 245), and is attached to this petition as part of the appendix, Exhibit 1. On July 11, 1955, the Supreme Court of Oklahoma made an order staying the enforcement of its mandate until October 1, 1955, pending the filing of a petition for writ of certiorari in the Supreme Court of the United States, and further providing that if said petition is filed before October 1, 1955, enforcement of the mandate shall be further stayed until such time as the Supreme Court of the United States renders its final decision herein, or until further order of said Court (R. 264).

(b) GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The opinion of the Supreme Court of the State of Oklahoma was rendered on May 3, 1955 (285 P.2d 407), and on May 10, 1955, upon the application of this petitioner (R. 250), said court made an order granting this petitioner until June 12, 1955, in which to file a petition for rehearing (R. 252), and on the 2nd day of June, 1955, this petitioner filed in the said Supreme Court of the State of Oklahoma, his petition for rehearing (R. 253). Said petition for rehearing was denied by said court on June 21, 1955 (R. 254-A). On July 11, 1955, the Supreme Court of Oklahoma made an order staying the enforcement of its mandate until October 1, 1955, pending the filing of petition for writ of certiorari by plaintiff in error, in the Supreme Court of the United States, and on July 11, 1955, said court made an order amending the said order, granting said stay pending the filing of petition for writ of certiorari by defendant in error, in the Supreme Court of the United States (R. 264).

The time within which a petition for writ of certiorari may be filed in this Court to review a judgment of the highest court of a state, is governed by Section 2101(c), U.S.C., which authorizes the filing of said petition within 90 days after the entry of such judgment or decree. This Court has held that the time for filing said petition for writ of certiorari in this Court is suspended by a petition for rehearing in the state courts, and the 90-day period begins to run from the day when the state court denies such petition for rehearing. *Gypsy Oil Company* v. *Escoe*, 275 U.S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112.

The statutory provision believed by petitioner to confer on this Court jurisdiction to review the judgment or decree of the Supreme Court of the State of Oklahoma, by writ of certiorari, is found in Section 1257, of Title 28, U.S.C., the pertinent parts of which are as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commision held or authority exercised under, the United States."

(c) THE QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether or not the judgment rendered by the Circuit Court in and for Fayette County, Illinois, on the 29th day of September, 1951, in a case wherein Mark Gannon was plaintiff and W. R. Britton was defendant, is entitled to full faith and credit in a suit brought on said judgment in the courts of the State of Oklahoma, the said Illinois court having unquestioned jurisdiction of the subject-matter, and having obtained jurisdiction of the person of W. R. Britton, by personal service of summons on said W. R. Britton in said State of Illinois (R. 65), in which action, by the judgment of the said Circuit Court of Fayette County, Illinois, the plaintiff Mark Gannon obtained judgment against the said

W. R. Britton in the sum of $18,000.00. This and such subsidiary questions fairly comprised therein, are the only questions presented for review.

(d) THE CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The constitutional provision involved in this case is Section 1 of Article IV of the Constitution of the United States:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The Act of Congress implementing this constitutional provision is found in Title 28, U.S.C., Section 1738, and is as follows:

> "The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

(e) STATEMENT OF THE CASE

On the 29th day of September, 1951, the Circuit Court in and for Fayette County, State of Illinois, rendered a judgment against W. R. Britton, in favor of Mark Gannon, for the sum of $18,000.00, in a case therein pending, wherein Mark Gannon was plaintiff, and W. R. Britton was defendant (R. 10-15). A duly authenticated and certified copy of this judgment, together with record of certain other formal proceedings in that court, are shown at pages 4 to 15 of the typewritten record, and a copy of said decree, and the authentication thereof by the clerk and the judge of said court, omitting the other formal proceedings, are shown in the appendix to this petition as Exhibit 2. This record shows that various other parties were made defendants in said action in the Circuit Court of Fayette County, Illinois, but it was not claimed that any liability alleged against such other defendants was a joint liability with W. R. Britton. The action against the other defendants was eventually dismissed, and their connection with the case has no direct bearing on the questions here presented.

On February 21, 1952, the said Mark Gannon, as plaintiff, filed his petition against the defendant W. R. Britton, in the District Court of Pontotoc County, Okla-

homa (R. 3), setting up such Illinois judgment, and praying for a judgment in the said District Court of Pontotoc County, Oklahoma, against the said W. R. Britton, for the said sum of $18,000.00 with interest thereon. A duly authenticated copy of the Illinois judgment was attached to said petition as an exhibit. A copy of the said petition filed in the District Court of Pontotoc County, Oklahoma, omitting the exhibits thereto, is shown in the appendix hereto as Exhibit 3. The exhibit to said petition, i.e., the certified copy of the Illinois judgment, is shown in the appendix as Exhibit 2. Summons was issued and served on the said W. R. Britton (R. 17-18). Thereafter, the defendant W. R. Britton appeared by his attorneys in the District Court of Pontotoc County, Oklahoma, and filed a motion to quash and demurrer to said petition, both of which were overruled by the court (R. 19-23). Thereafter, said defendant W. R. Britton filed an answer in the District Court of Pontotoc County, Oklahoma, in said cause (R. 24-26), which answer is shown in the appendix hereto as Exhibit 4. Plaintiff filed a motion to require the defendant to make the said answer more definite and certain in certain respects, and thereafter, on December 29, 1952, the defendant W. R. Britton filed an amended answer and cross-petition answer (R. 28-34) which answer and cross-petition answer are shown in the appendix hereto as Exhibit 5. In said amended answer and cross-petition, the defendant sets out certain alleged transactions with one "Spike" Gannon, whom he alleges to be a brother of the plaintiff Mark Gannon, and alleges that the said "Spike" Gannon is the real party in interest, and the only party with whom he had any business transactions; that he made

the bill of sale to the interest in the drilling rig to Mark Gannon at the request of "Spike" Gannon, refers to Mark Gannon as the "sham plaintiff", and alleges that the said "Spike" Gannon made certain representations to him about the lawsuit in Fayette County, Illinois, which induced Britton to make no appearance in the said case in Fayette County, Illinois, and alleges that the Illinois judgment is therefore void and of no force and effect. In his cross-petition, he asks that the said "Spike" Gannon be made a party defendant, and sets out at length a claim for damages against the said "Spike" Gannon.

The plaintiff Mark Gannon promptly filed a motion to strike the said amended answer and cross-petition (R. 35-36), which said motion to strike is shown in the appendix hereto as Exhibit 6. Said motion to strike set up that the allegations of said amended answer and cross-petition are wholly irrelevant to the issues involved, did not constitute any defense to the original action of plaintiff, and further set up that the judgment of the Circuit Court of Fayette County, Illinois, *"has now become final, and is entitled to full faith and credit"* in the District Court of Pontotoc County, Oklahoma.

On February 4, 1953, the District Court of Pontotoc County, Oklahoma, made an order sustaining the said motion to strike all of the said answer and cross-petition, except the general denial contained therein (R. 37-38), and at request of counsel for defendant, gave the defendant five days in which to file a second amended answer. The said order sustaining the motion to strike is shown in the appendix hereto as Exhibit 7.

Thereafter, on February 14, 1953, the defendant W. R. Britton filed a second amended answer (R. 39-41), setting up a number of the same matters alleged in his answer and first amended answer. Said second amended answer is shown in the appendix hereto as Exhibit 8. Plaintiff filed a motion to strike all of said second amended answer, except the first three lines thereof, constituting a general denial (R. 42-43). Said motion to strike is shown in the appendix hereto as Exhibit 9. On March 4, 1953, the court made an order sustaining the said motion to strike (R. 44), to which the defendant excepted, and the said order sustaining the said motion is shown in the appendix hereto as Exhibit 10.

Under this condition of the pleadings, the case proceeded to trial before the Honorable John Boyce McKeel, Judge of the District Court in and for Pontotoc County, Oklahoma, on May 4, 1953. The record of the proceedings of the trial is shown in the typewritten record filed herewith, at pages 53 to 79, and a copy thereof appears in the appendix hereto, as Exhibit 11. Briefly summarizing the proceedings at said trial, plaintiff introduced in evidence as his Exhibit 1 (R. 55), the authenticated copy of the judgment rendered by the Circuit Court of Fayette County, Illinois, on the 29th day of September, 1951, which original authenticated copy was attached to plaintiff's petition as Exhibit A (R. 10-15), together with other parts of the record from the Circuit Court of Fayette County, Illinois (R. 4-9) (see appendix hereto, Exhibit 2). Plaintiff introduced at the trial as Exhibit 2 (R. 56), an authenticated copy of the original complaint in equity, filed in the Illinois court in said case. Said exhibit appears in full in the type-

written record filed herewith (R. 81-106), including the exhibit thereto, and the said complaint in equity, omitting the exhibits, is shown in the appendix hereto as Exhibit 12. Plaintiff also introduced at the trial as Exhibit 3 (R. 57), a duly authenticated copy of further proceedings in the Circuit Court of Fayette County, Illinois, including alias request for summons, Circuit Court summons and return thereof, showing service on W. R. Britton, affidavit as to military service, motion for leave to file amended complaint, affidavit of mailing copy of the notice thereof, the notice, and the amended complaint with exhibits thereto. The authenticated copy of this Exhibit 3 appears in full in the typewritten record filed herewith, pages 109 to 146, and, omitting the affidavit as to military service and Exhibit B to the amended complaint as not pertinent, is shown in the appendix hereto as Exhibit 13. Upon the introduction of the said three exhibits, the plaintiff rested his case (R. 57).

Thereupon, counsel for defendant produced as witness on behalf of the defendant, W. R. Britton (R. 58). The examination of this witness is shown in full in the typewritten record, at pages 58 to 71, and the same is shown in the appendix hereto as part of Exhibit 11. Most of the questions asked Mr. Britton were in regard to transactions prior to the bringing of the suit in Illinois, in regard to conversations with Mr. "Spike" Gannon, a brother of the plaintiff Mark Gannon, both before and after the suit was filed in Illinois, and as to the merits of the case involved in the Illinois suit. To all of such questions, counsel for the plaintiff Mark Gannon objected. In most instances, the

objection was in the following words: "We object to that, if the Court please, as an attempt to go behind the judgment and into the merits of the case." Most of these objections were sustained by the trial court, and counsel for the defendant would dictate into the record what he expected the witness to state in answer to the question. None of such tendered testimony disclosed any facts which would impeach the jurisdiction of the Illinois court over the subject-matter of the action or the person of the defendant, and none of said tendered testimony tended to show any fraud in obtaining the jurisdiction of said court over the person of the defendant W. R. Britton. To the contrary, referring to the Illinois case, Britton was asked by his attorney: "Were you served with summons in the suit above referred to?" To which Britton answered, "Yes" (R. 65).

Nowhere in the tendered testimony is it stated that any representations were made to the defendant W. R. Britton in regard to the Illinois suit by the plaintiff Mark Gannon, or at his instigation. All of such tendered testimony is to the effect that "Spike" Gannon, who is not a party to this action, made such representations as are claimed by the defendant. Defendant's counsel asked this witness, "Did you ever have any contact or make any contract with the plaintiff in this suit, Mark Gannon?" The objection to said question by counsel for plaintiff being sustained, the defendant's counsel stated in the record, "To which the defendant excepts, and states that he expects the answer to be that Mr. Britton never had any contact with or contract with or financial dealings with Mark Gannon, the plaintiff in this case" (R. 70).

The defendant then produced as a witness Margaret Carol Reagan Britton, and her testimony appears in full in the typewritten record filed herewith, at pages 72 to 76, and is shown in the appendix hereto attached, as part of Exhibit 11. This witness testified that she was the wife of the defendant W. R. Britton. The questions asked her were similar to the questions asked W. R. Britton, and the objections of counsel for the plaintiff were the same as the objections to the questions asked the witness W. R. Britton. Most of said objections were sustained by the court, and counsel for the defendant dictated into the record what he expected the answer of the witness to be, and none of those tendered answers tended to impeach the jurisdiction of the Circuit Court of Fayette County, Illinois, as to the subject-matter or of the person of the defendant W. R. Britton.

The defendant then introduced in evidence his Exhibit 1 (R. 76), which exhibit is shown in the typewritten record filed herewith, at pages 147 to 207. This exhibit is very largely a repetition of Exhibits 1, 2 and 3 of the plaintiff, and contains no matter which in any way throws any cloud on the jurisdiction of the Illinois court, and consequently, is not shown in the appendix hereto.

Thereupon, both parties announced that they closed their case (R. 78), and after argument of counsel which is not shown in the record, the court pronounced judgment for the plaintiff, for the amount prayed for (R. 79), thereby giving full faith and credit to the Illinois judgment. The journal entry of the judgment of the District Court of

Pontotoc County, Oklahoma (R. 208-210), is shown in the appendix hereto attached, as Exhibit 14.

The defendant W. R. Britton filed his motion for new trial (R. 211-212), which was overruled by the court on May 20, 1953 (R. 218-219), and said defendant prosecuted his appeal to the Supreme Court of the State of Oklahoma, and filed in said court his petition in error (R. 1-a, 1-c), on November 3, 1953, together with a case-made, showing a complete record of the proceedings in the District Court of Pontotoc County, Oklahoma.

In all the proceedings in the Supreme Court of the State of Oklahoma, the issue was clearly drawn as to whether the Illinois judgment was entitled to full faith and credit, under Section 1 of Article IV of the Constitution of the United States. Britton's counsel, in their brief, stated the questions involved to be as follows:

> "There are two questions of law involved herein:
>
> "1. Should a judgment obtained by extrinsic fraud in a foreign court be considered final and conclusive in Oklahoma *ipso facto* and no defense be permitted to be interposed against the finality thereof in Oklahoma?
>
> "2. Should the trial court in Oklahoma have allowed the defendant, Britton, to present evidence of such extrinsic fraud in the procurement of the judgment in the Illinois court?"

Mark Gannon's counsel countered in their brief with a statement of their contentions, as follows:

> "1-a. The Circuit Court in and for Fayette County, Illinois, had jurisdiction of the plaintiff, Mark Gannon,

and of the defendant, W. R. Britton, and had undisputed jurisdiction of the subject-matter; and its judgment here in question is binding and conclusive upon the defendant, W. R. Britton, and is entitled to full faith and credit in the courts of the State of Oklahoma.

"1-b. The judgment of a state, rendered in a case in which the court had jurisdiction, has all the force, in another state, of a domestic judgment, and the plea that the judgment was procured by fraud is not available as an answer to an action there on the judgment.

"—*Christmas* v. *Russell*, 72 U.S. 290, 18 L. Ed. 475;

Maxwell v. *Stewart*, 88 U.S. 71, 22 L. Ed. 564.

"1-c. This is particularly true when the fraud alleged does not affect the jurisdiction of the court and does not appear on the face of the judgment roll itself.

"2. The judgment of a sister state, when made the basis of an action in another state, may be impeached on the grounds of fraud, *only when* fraud in the judgment could be set up against it in the courts of the state where it was rendered, *i.e.*, the judgment of the sister state has the same degree of conclusiveness in that foreign state as in the home state."

About a year and one-half after said brief was filed, the said W. R. Britton, plaintiff in error, filed a motion in the Oklahoma Supreme Court, alleging that a few days prior thereto, to-wit, on January 20, 1955, the said Mark Gannon had filed an action in the United States District Court for the Eastern District of Oklahoma, thereby seeking to circumvent the state courts by filing such federal

court action involving the same fact situation, the same questions of law, and the same relief which may be granted to either party by virtue of the action herein pending before the Supreme Court, and that the same and all necessary parties have been joined in the state court action, praying that the Supreme Court of Oklahoma advance said cause for speedy action, and set the same down for oral argument (R. 237-239). The said motion for oral argument appears in full in the appendix attached hereto, as Exhibit 15.

The said Mark Gannon, defendant in error, filed a response to the motion for oral argument (R. 240-242) which response is set out in full in the appendix attached hereto, as Exhibit 16. In said response the defendant in error made no objection to setting the case down for oral argument, and welcomed any action advancing said cause in said court. Said defendant in error admitted filing in the United States District Court for the Eastern District of Oklahoma, Cause No. 3881-Civil; stated that said case did not involve the same questions of law or facts involved in the case pending in the Supreme Court of Oklahoma; stated that said federal court case was in the nature of a creditor's bill; explained the necessity of filing such action, stating that the said W. R. Britton had not given a supersedeas bond on the appeal of this case to the Supreme Court of Oklahoma; that subsequent to the obtaining of said judgment in the District Court of Pontotoc County, Oklahoma, said W. R. Britton had caused to be organized under the laws of the State of Oklahoma, a corporation known as Carroll Oil, Incorporated. Thereafter, on June 18,

1953, had assigned to said corporation oil and gas leases of great value, for the purpose of hindering, delaying and defrauding the defendant in error herein in the collection of his debt and judgment, and that in said federal court case, he was asking to set aside the fraudulent conveyances made by the said W. R. Britton to other parties, to hinder, delay and defraud the said Mark Gannon.

Oral argument was had on March 1, 1955 (R. 243), and the opinion and judgment of the Supreme Court of the State of Oklahoma was delivered and filed on May 3, 1955 (R. 245-249). The said opinion clearly points out that the point involved was whether the judgment of the Illinois court should have full faith and credit in the courts of the State of Oklahoma. And it stated that the trial court "found that under the full faith and credit clause of the Constitution of the United States, it had no right to hear and determine the validity of the defendant's defense raised by its amended answer and cross-petition, and proper testimony in support thereof." The said opinion further states: "The general rule is that a state court is not required to recognize the judgment of a court of another state, territory, or country subject to the jurisdiction of the United States, where the court rendering the judgment was without jurisdiction or judgment was obtained by extrinsic fraud." The opinion further states: "The trial court erred in refusing the proffered evidence of extrinsic fraud," and the Supreme Court thereupon reversed the judgment of the District Court of Pontotoc County, Oklahoma, and remanded the case for new trial. The said opinion is set out in full in the appendix attached hereto, as Exhibit 1. Within the time allowed by the court (R. 252), the defend-

ant in error, Mark Gannon, filed his petition for rehearing (R. 253-254). Said petition for rehearing is set out in full in the appendix attached hereto, as Exhibit 17. In said petition for rehearing, the said defendant in error, Mark Gannon, pointed out a number of errors in the opinion of the Oklahoma Supreme Court, and expressly complained that said court had failed and refused to give full faith and credit to the Illinois judgment, as required by Article IV, Section 1 of the Constitution of the United States, and prayed that a rehearing be granted, and that full faith and credit be given to the judgment of the Circuit Court of Fayette County, Illinois, and that recognition be given to the controlling decisions of the United States Supreme Court, and the Supreme Court of the State of Illinois, which decisions should be binding and controlling on said court.

Thereafter, said Mark Gannon filed his petition to stay issuance of mandate and execution thereof (R. 255-256), again calling attention to the fact that the question involved was a construction of Article IV, Section 1, of the Constitution of the United States, and stating that said defendant in error intended to apply to the Supreme Court of the United States for a writ of certiorari. The plaintiff in error, W. R. Britton, filed a response to said motion, protesting against the stay of the issuance or execution of the mandate of the Supreme Court of Oklahoma (R. 257-258), asserting, among other things, that the Supreme Court of the United States was wholly without jurisdiction to review the decision of the Supreme Court of the State of Oklahoma, and setting up in the brief attached to said

response, that the judgment of the Supreme Court of Oklahoma was not final because it remanded the case for trial to the District Court, and again calling to the attention of the court that said Mark Gannon had filed an ancillary action in the United States District Court for the Eastern District of Oklahoma. A copy of said response appears in full in the appendix attached hereto, as Exhibit 18. Said defendant in error, Mark Gannon, filed a reply to said response (R. 259-262), which reply is shown in full in the appendix attached hereto, as Exhibit 19. In said reply, it is pointed out that the Supreme Court of the United States is the final arbiter as to its jurisdiction to grant certiorari, and that said Court had heretofore pointed out that Section 1257, U.S.C., had not been intended to preclude the review of a federal question which is in fact ripe for adjudication when tested against the policy of said Section 1257. *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 97 L. Ed. 1094, 73 Sup. Ct. 749. In said reply, it was also pointed out that it was necessary that the execution of mandate be stayed in order to protect the rights of Mark Gannon in the suit filed in the United States District Court for the Eastern District of Oklahoma, to set aside fraudulent conveyances made by Britton in an attempt to hinder, defraud and delay the said Gannon in the collection of his debt and judgment against Britton. It appearing that this case pending in the United States District Court for the Eastern District of Oklahoma may be considered a companion case as that term is used in Rule 23, paragraph 1(i), we attach hereto in the appendix, as Exhibit 20, the order of the United States District Court for the Eastern District of Oklahoma, made on the 1st day of

July, 1955, staying further proceedings in that case until final adjudication of the case in the state court.

(h) ARGUMENT

We believe that unquestionably, the Supreme Court of the State of Oklahoma has decided a federal question in a way not in accord with the applicable decisions of this Court, in that they have held that the judgment of the Circuit Court of Fayette County, Illinois, is not entitled to full faith and credit in the courts of the State of Oklahoma, but is subject to the defense of alleged extrinsic fraud, alleged to have been practiced by a stranger to said Illinois suit, a brother to the plaintiff in this suit, and notwithstanding the fact that the court in Illinois had jurisdiction of the subject-matter and jurisdiction of the defendant W. R. Britton by personal service upon him, as shown by the authenticated record (R. 112), and by the defendant's admission (R. 65).

At all times during the proceedings in the Oklahoma courts, this petitioner has contended that the judgment of the Circuit Court of Fayette County, Illinois, wherein Mark Gannon obtained a judgment against W. R. Britton, was entitled to full faith and credit in the courts of Oklahoma, under the provisions of Article IV, Section 1 of the Constitution of the United States; that if there is any vestige of truth in the allegations which the said W. R. Britton has sought to incorporate in his answer, his amended answer, and his second amended answer tendered to the District Court of Pontotoc County, Oklahoma, alleging fraud practiced by the brother of the plaintiff in said Illinois action,

a stranger to the record, preventing the defendant W. R. Britton from defending said action in the Illinois court, then such defense should have been set up in the Circuit Court of Fayette County, Illinois, either at the time of the trial, or by motion or bill in the nature of a bill of review, *in the same court.*

The Illinois judgment is final in the State of Illinois, and cannot be collaterally attacked in any court in the State of Illinois, and consequently, cannot be collaterally attacked in the courts of the State of Oklahoma. As stated by this Court in the case of *Roche* v. *McDonald* (1928), 275 U.S. 449, 72 L. Ed. 365, 48 Sup. Ct. 142, 53 A.L.R. 1141,

> "It is settled by repeated decisions of this court that the full faith and credit clause of the Constitution requires that the judgment of a state court which had jurisdiction of the parties and the subject-matter in suit, shall be given in the courts of every other state the same credit, validity, and effect which it has in the state where it was rendered and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that state can be relied on in the courts of any other state."

The same rule has been rigidly adherred to, down to the present date.

Then we look to the decision of the highest court of the State of Illinois, to see what credit, validity and effect would there be given to this judgment rendered by the Circuit Court of Fayette County, Illinois, in favor of Mark Gannon and against W. R. Britton, and what defenses could there be urged on a collateral attack against such judgment. We think this question is fully answered, and

the various phases of it carefully explained, by the Supreme Court of the State of Illinois, in the case of *People* v. *Sterling*, 357 Ill. 354, 192 N.E. 229 (1934), in a case where the Circuit Court of Cook County, Illinois, was asked to hold void and of no force and effect an order and judgment of the Circuit Court of Sangamon County, Illinois. The pertinent holdings of the court are briefly and concisely stated in Syllabi 2, 3 and 4, shown at page 229 of 192 Northeastern Reporter, as follows:

> "2. Courts. Decree of court of competent jurisdiction cannot be set aside for fraud, by court of equal jurisdiction which did not render decree.
>
> "3. Judgment. Where no process is commenced which would void judgment in mode and at time prescribed by law, judgment of court having jurisdiction of subject-matter and parties is conclusive upon same parties in any other proceeding, or before any other tribunal.
>
> "4. Judgment. Decree is invalidated by fraud which prevents court from acquiring jurisdiction, but not by fraud occurring in proceedings after jurisdiction is acquired."

The rules laid down in this syllabi are fully supported by the language of the court in the body of the opinion. We quote from the body of the opinion as follows:

> "In this bill, as compared with the original bill in Sangamon County, there is an identity of parties, of cause of action, of subject-matter, and of relief prayed. We must therefore at the beginning of our inquiry determine whether or not it is true, as appellant contends, that fraud vitiates every transaction into which it enters, even to the extent of so far invalidating a

decree of a court of competent jurisdiction that it can be held for naught by another court of equal, but no greater, jurisdiction when later called in question between the same parties, concerning the same subject-matters, and praying for the same relief. If such is the rule, it must necessarily follow that the second litigation would be no more conclusive than the first had been, nor, for that matter, would the third or fourth, or any other number. The unqualified adoption of such a rule would be so disruptive of the orderly processes of our courts and so fatal to the well-known principle that it is desirable that litigation should have an end, that we have examined the subject with some care. We find upon our examination that the rule is not as contended for by the people, but quite the contrary."

That court said further, at page 232 of 192 Northeastern Reporter:

"Upon the other hand, we find the rule to be firmly established in American Jurisprudence that a judgment of a court of competent jurisdiction, having jurisdiction of the subject and the parties by legal process duly served, where no appeal, writ of error, certiorari, review or other legal process lies for revising, reversing, or affirming such judgment, or where no such process is commenced by the party who would void the judgment in the mode and at the time prescribed by law, is conclusive upon the same parties in any other proceeding in law, in equity, or before any other judicial tribunal."

Further, on page 233 of the same opinion, the Supreme Court of Illinois said:

"(4) Notwithstanding these authorities and this well-established principle, the appellant contends that

> because the decree in the Sangamon county circuit court was procured by fraud it must be treated as a nullity. In considering this point it must be borne in mind that there are two classes of fraud drawn in question in cases of this kind: First, there is that kind of fraud which prevents the court from acquiring jurisdiction or merely gives it colorable jurisdiction; and, second, that kind of fraud which occurred in the proceedings of the court after jurisdiction had been obtained, such as perjury, concealment, and other chicanery. The first variety of fraud will invalidate the decree, rendering it an entire nullity. On the other hand, it is well established that the second class has no such legal effect."

In the same opinion, the Illinois Supreme Court said further:

> "This leaves for our consideration only the final question of whether a bill in the nature of a bill of review may be brought in any court other than the one in which the original decree was entered. It is clearly established in this state that it cannot. * * * A bill to review a decree in chancery can only be filed in the court wherein the decree sought to be reviewed was pronounced. * * * One court cannot review the decree of another court, even though both courts have concurrent original jurisdiction. A bill of review must be filed in the court where the record of the decree remains and where the decree was pronounced."

This case was followed by the Supreme Court of the State of Illinois, in the case of *Wood* v. *First National Bank of Woodlawn*, 383 Ill. 515, 50 N.E.2d 830, 834 (1943), wherein the court said:

> "Plaintiffs cannot maintain this action as a bill of review based on the fraud of the master. They claim

the fraud vitiated the sale and left the court without jurisdiction to approve it. As has been stated, the plaintiffs in this suit were defendants in the foreclosure action, and that the court had jurisdiction of them and of the subject-matter is not questioned. Jurisdiction of the subject-matter is the power to adjudge concerning the general question involved, and if a complaint states a case belonging to a general class over which the authority of the court extends, the jurisdiction attaches and no error committed by the court can render the judgment void. If a judgment is collaterally attacked under such circumstances of jurisdiction, it is immaterial how irregular or erroneous its proceedings may have been. Such a judgment is binding on the parties and on every court unless reversed or annulled in a direct proceeding. If there is a total want of jurisdiction in a court, either as to the subject-matter or as to the parties, its proceedings are an absolute nullity and no rights are created by them, and they may be pronounced void when collaterally attacked. *People* v. *Sterling*, 357 Ill. 354, 192 N.E. 229; *Miller* v. *Rowan*, 251 Ill. 344, 96 N.E. 285; *People ex rel. Raymond* v. *Talmadge*, 194 Ill. 67, 61 N.E. 1049."

In that case the court quoted at length from the case of *People* v. *Sterling, supra*, as to the kinds of fraud that will invalidate a decree.

Again, in the case of *Dean* v. *Kellogg* (1946), 394 Ill. 495, 68 N.E 2d 898, 903, the Supreme Court of Illinois said:

"The allegations of the complaint are not sufficient to invalidate the judgment on collateral attack because the alleged fraud of Kellogg was not of the type which attempted to give the court a colorable jurisdiction. If the alleged facts were true it would only show perjury or chicanery in obtaining judgment after juris-

diction was acquired. There is no fact alleged which would show jurisdiction to hear the case was not acquired in the regular manner. The rule as to the type of fraud which will render a judgment void upon collateral attack is well settled."

Immediately following this quotation, the Supreme Court of Illinois again quoted from the case of *People* v. *Sterling, supra,* as to the two kinds of fraud that may be involved, being the same quotation which we have given above. This doctrine has been affirmed by the courts of Illinois in many other cases, wherein the case of *People* v. *Sterling, supra,* has been followed. Among those cases are:

—*Steffens* v. *Steffens* (1949), 338 Ill.App. 599, 88 N.E.2d 502, 503, affirmed by the Supreme Court of Illinois, January 18, 1951, 408 Ill. 150, 96 N.E.2d 458;

Department of Revenue v. *Joch* (Supreme Court of Illinois) (1951), 410 Ill. 308, 102 N.E.2d 155, 159.

We here call attention to the fact that in the opinion of the Supreme Court of Oklahoma which we here ask to have reviewed, no cases from the Supreme Court of the State of Illinois were cited to justify that opinion. The only Illinois cases cited in that opinion were cases from the Illinois Court of Appeals, which is not the highest court of that state. We think if those cases from the Illinois Court of Appeals are carefully read, they cannot be said to be in conflict with the cases of the Supreme Court of Illinois which we have above quoted; but even if they were in conflict with the Supreme Court of Illinois, they could

not overrule that higher court, and the principles announced in the decisions of the Supreme Court of the State of Illinois would still be the law as established in that state.

We might also call attention to the fact that the United States Court of Appeals for the Eighth Circuit, in the case of *Turner* v. *Alton Banking and Trust Company* (1948), 166 F.2d 305, 309, recognized as the established rule in the State of Illinois, the principle laid down in the quotations we have above set out from the Illinois Supreme Court, and summed up that rule as follows:

> "Fraud, (perjury, concealment, and other chicanery) resorted to in the proceedings beyond the point of creating foundational jurisdiction, does not make the order, decree or judgment void and subject to collateral attack."

The opinion and judgment of the Supreme Court of the State of Oklahoma, which we here seek to have reviewed, is not in accord with the applicable decisions of this Court.

At an early date, this Court held that the judgment of a state court rendered in a case in which the court had jurisdiction, has all the force, in another state, of a domestic judgment, and the plea that the judgment was procured by fraud is not available as an answer to an action there on the judgment. *Christmas* v. *Russell,* 5 Wall. 290, 18 L. Ed. 475. In the body of that opinion, this Court said:

> "Indeed, the court in effect, say that the rule is undeniable that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other

matter which the parties might have litigated in the cause, and which they might have had decided."

In the case of *Maxwell* v. *Stewart* (1875), 88 U.S. 71, 22 L. Ed. 564, the Court said:

"In *Christmas* v. *Russell,* 5 Wall. 304 (72 U.S., XVIII, 479), this court held that fraud could not be pleaded to an action in one State upon a judgment in another. With this we are satisfied."

Other cases in this Court which have frequently cited and consistently followed the rule laid down in those two early cases, are as follows:

—*Hanley* v. *Donaghue* (1885), 116 U.S. 1, 29 L. Ed. 535;

Simmons v. *Saul* (1891), 138 U.S. 439, 34 L. Ed. 1054, 11 Sup. Ct. 369; held expressly that fraud in foreign judgments could not be pleaded;

Fauntleroy v. *Lum* (1908), 210 U.S. 230, 52 L. Ed. 1039, 28 Sup. Ct. 641;

Bigelow v. *Old Dominion Copper Mining and Smelting Company* (1912), 225 U.S. 111, 56 L. Ed. 1009;

Williams v. *North Carolina* (1942), 317 U.S. 287, 87 L. Ed. 279, 63 Sup. Ct. 207;

Magnolia Petroleum Company v. *Hunt* (1944), 320 U.S. 430, 88 L. Ed. 149, 64 Sup. Ct. 208;

Union National Bank v. *Lamb* (1949), 337 U.S. 42, 93 L. Ed. 1190, 1195, 69 Sup. Ct. 911;

Morris v. *Jones,* 329 U.S. 545, 67 Sup. Ct. 451, 91 L. Ed. 488;

Titus v. *Wallick* (1939), 306 U.S. 282, 83 L. Ed. 653, 59 Sup. Ct. 557;

Roche v. *McDonald* (1928), 275 U.S. 449, 72 L. Ed. 365, 48 Sup. Ct. 142, 53 A.L.R. 1141;

Sherrer v. *Sherrer* (1948), 334 U.S. 349, 92 L. Ed. 435, 68 Sup. Ct. 1090.

In the case of *Union National Bank* v. *Lamb* (1949), *supra*, this Court, after discussing many of the earlier cases above cited, stated:

> "It is the judgment that must be given full faith and credit. In neither case can its integrity be impaired, save for attacks on the jurisdiction of the court that rendered it."

In the case of *Sherrer* v. *Sherrer*, *supra*, this Court said:

> "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister state on a decree valid in the state in which it was rendered."

While the Supreme Court of Oklahoma, in its opinion, did not expressly hold that the plaintiff Mark Gannon was not the real party in interest, it apparently gave great weight to that contention advanced by Britton.

Undoubtedly, the Oklahoma courts may not constitutionally refuse to entertain a suit on the judgment of a sister state by one in whose favor it was rendered, on the

ground that the plaintiff is not the real party in interest, where he was regarded by the courts of the state rendering the judgment, as having sufficient interest in the claim in suit, to recover thereon. This court said, in the case of *Titus* v. *Wallick, supra,* as follows:

> "It is the judgment and not the cause of action which gave rise to it for which credit is claimed, and the constitutional mandate requires credit to be given to a money judgment rendered on a civil cause of action in another state, even though the forum would have been under no duty to entertain the suit on which the judgment was founded. *Christmas* v. *Russell,* 5 Wall. 290, 18 L.ed. 475; *Fauntleroy* v. *Lum,* 210 U.S. 230, 52 L.ed. 1039, 28 S.Ct. 641; *Roche* v. *McDonald,* 275 U.S. 449, 72 L.ed. 365, 48 S.Ct. 142, 53 A.L.R. 1141; *Milwaukee County* v. *M. E. White Co., supra* (296 U.S. 277, 80 L.ed. 228, 56 S.Ct. 229).
>
> "Even though the Ohio court might have declined to recognize petitioner as the proper party to sue upon the assigned claim, a suit upon a judgment of another state, by virtue of the Constitution, stands upon a different footing. The Ohio court is not free to withhold from petitioner, the record owner of a judgment valid and enforceable by him in New York, the full benefit of the constitutional command that the judgment shall receive in the courts of Ohio such faith and credit as it is entitled to receive in New York."

FINALITY OF THE JUDGMENT OF THE OKLAHOMA COURTS

The opinion of the Supreme Court of Oklahoma, in the case of Britton v. Gannon, shown in the appendix hereto as Exhibit 1, is final in its denial of full faith and credit to the judgment rendered by the Circuit Court of Fayette County, Illinois. While it remanded the case for new trial, it expressly prohibited the District Court of Pontotoc County, Oklahoma, from giving full faith and credit to the Illinois judgment. The Supreme Court of Oklahoma said: "The trial court erred in refusing the proffered evidence of extrinsic fraud." The evidence of extrinsic fraud proffered by Britton goes to the question as to whether or not Mark Gannon was the real party in interest, and as to whether or not the statements of "Spike" Gannon, a stranger to this suit, constituted such fraud as would make the judgment of the Illinois court void, even though that Illinois court had jurisdiction of the subject-matter, and had jurisdiction of the person of W. R. Britton, and the Oklahoma Supreme Court expressly says that such evidence of extrinsic fraud is "not for the purpose of reviewing, setting aside, modifying, or annulling the judgment of the sister state, but to prevent its enforcement in the collateral court." This is an express denial of full faith and credit to the Illinois judgment, and the federal question is now clearly "ripe for adjudication." In a case similar in principle, this Court said:

> "Ordinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment.

"Yet we are not bound to determine the presence or absence of finality from a mere examination of the 'face of the judgment.' We have not interpreted § 1257 so as to preclude review of federal questions which are in fact ripe for adjudication when tested against the policy of § 1257."

—*Pope* v. *Atlantic Coast Line R. Co.* (1953), 345 U.S. 379, 97 L. Ed. 1094, 73 Sup. Ct. 749.

In the case of *Johnson* v. *Muelberger* (1951), 340 U.S. 581, 95 L. Ed. 552, 71 Sup. Ct. 474, where, as in the case at bar, the trial court had held that a foreign judgment was entitled to full faith and credit, and that judgment was reversed by the highest court of the State of New York, and remanded for further trial, this Court said:

"The Appellate Division affirmed the Surrogate's decree *per curiam*, 275 App.Div. 848, 88 NYS2d 783, but the New York Court of Appeals reversed. 301 NY 13, 92 NE2d 44. The remittitur remanded the case to the Surrogate 'for further proceedings not inconsistent with' the opinion of the Court of Appeals. But in light of the record before us we assume that the requirement of Florida for a residence of 90 days as a jurisdictional basis for a Florida divorce is no longer open as an issue upon return of these proceedings to the Surrogate's Court. Accordingly the judgment under review is a final decree."

In the case of *Radio Station WOW, Inc.*, v. *Johnson*, 326 U.S. 120, 89 L. Ed. 2092, 65 Sup. Ct. 1475, certiorari was granted although the judgment in the state court was not final, on the theory that the only federal question which could arise in the case, had been finally determined by the state court. Therein, this Court said:

> "The presupposition in allowing such review is that the Federal questions that could come here have been adjudicated by the State court, and that the accounting which remains to be taken could not remotely give rise to a Federal question."

The case of *Titus* v. *Wallick* (1939), 306 U.S. 282, 83 L. Ed. 653, 59 Sup. Ct. 557, involved the attempt of the petitioner to enforce a New York judgment in the courts of Ohio. The defenses interposed were that the petitioner was not the real party in interest in the Ohio suit, and that the judgment had been procured in New York by fraud. The trial court sustained the defenses, the Ohio Court of Appeals affirmed, holding that the judgment sustaining the defenses did not deny the New York judgment the full faith and credit required by the Constitution. On appeal to the Supreme Court of Ohio, the appeal was dismissed on the ground that the case involved no debatable constitutional question. This Court granted certiorari, and in the body of the opinion said:

> "When a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted Federal right is denied, and the sufficiency of the grounds of denial are for this court to decide." Citing many cases.

There is a strong similarity between the facts in that case, and this case, the principal difference being that in that case, the trial court refused to give full faith and credit to the foreign judgment, and was sustained by the highest courts of Ohio. In the case at bar, the trial court gave full faith and credit to the Illinois judgment, and the

highest court of the State of Oklahoma reversed the case, refusing to give full faith and credit to the Illinois judgment, and remanding the case for trial on issues inconsistent with any theory of full faith and credit to the foreign judgment.

In the case of *Carondelet Canal and Navigating Company* v. *Louisiana*, 233 U.S. 362, 388, 58 L. Ed. 1001, 34 Sup. Ct. 627, where the judgment of a state court was not final, but would finally dispose of federal questions, this Court considered appeal on writ of error. The state court had directed the delivery of most of the canal property to the state, effectively disposing of the federal questions, but had reversed for further decision, some question as to the other property, and this Court said (58 L. Ed. 1005):

> "In the case at bar there is distinct and explicit finality, and the further proceedings are directed to apply only to the 'questions reserved.' And it is to be assumed this was purposely done to give finality to the questions not reserved, so that the decree could be immediately executed upon the property involved requiring it to be delivered into the possession and administration of the state. This disposition, we can easily conceive, the court considered necessary to the rights which the state was adjudged to have, and the remedy commensurate with them. The decree, therefore, had a definiteness which did not exist in the cited cases, the Federal rights asserted by the canal company were injuriously disposed of. The ground of dismissal of the writ of error based on the judgment is not, therefore, sustained."

Likewise, in the case at bar, the opinion of the Supreme Court of Oklahoma has definiteness in that it denies

full faith and credit to the Illinois judgment, and remands the case for trial on issues which could have been tried and determined before the Circuit Court of Fayette County, Illinois, but could not thereafter, be raised as grounds for collateral attack on such judgment in any other court in the State of Illinois, and as aptly stated in the case of *Sherrer* v. *Sherrer, supra,* "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own." The dereliction of the respondent under such circumstance should not be permitted to provide a basis for subsequent attack in the courts of sister states, and the remand of the case by the Supreme Court of Oklahoma to the trial court, for trial on those issues, is a final denial of full faith and credit to the Illinois judgment.

In the case of *Harriman* v. *Northern Securities Company,* 197 U.S. 244, 299, 49 L. Ed. 739, 25 Sup. Ct. 493, where the United States Circuit Court of Appeals merely reversed the decision of the trial court, thereby preventing the trial court's decision from being absolutely final, certiorari was nevertheless allowed by this Court, and this Court, in the first paragraph of that opinion, said:

> "In applying to this Court for the writ of certiorari counsel for complainants insisted that the circuit court of appeals had practically disposed of the entire controversy on the merits, although its decree only reversed the order of the circuit court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In our opinion the record presented the whole case to that court in such wise that it might properly have been finally disposed of

in terms by its decree, in accordance with the well-settled rule upon that subject."

We think it must likewise be said as to the case at bar, that the record before the Supreme Court of the State of Oklahoma presented the whole case, in such wise that the court should have affirmed the judgment of the trial court, granting full faith and credit to the Illinois judgment.

This case involves the important issue as to what extent full faith and credit shall be given by the courts of one state to the judgment of a sister state, and whether or not the courts of one state can try issues between the parties which could and should have been raised in the original action in the sister state, wherein the first state had jurisdiction of the subject-matter and of the parties.

In this case, full faith and credit has been denied the judgment of the Illinois court by the Supreme Court of Oklahoma, and the federal question here involved is in fact ripe for adjudication. It is particularly a matter of importance that this federal question be determined at this time, in order that the United States District Court for the Eastern District of Oklahoma can determine what weight it should give to the judgment in the case of Mark Gannon v. W. R. Britton, in the District Court of Pontotoc County, Oklahoma, and whether or not it can grant relief to the said Mark Gannon on account of the transfer of valuable property by W. R. Britton to other parties, after the judgment in the District Court of Pontotoc County was obtained against him. The issues in this case in the United States

District Court for the Eastern District of Oklahoma, were brought to the attention of the Supreme Court of Oklahoma, and the reference thereto appears in Exhibits 15, 16, 18 and 19 in the appendix attached to this petition, and the order of the said United States District Court, staying further proceedings in that case until the validity of the judgment of the District Court of Pontotoc County, Oklahoma, is established, appears in the appendix attached hereto, as Exhibit 20.

If full faith and credit is denied to the Illinois judgment, and petitioner is compelled to retry the case in the District Court of Pontotoc County, Oklahoma, on the issues raised by respondents, *i.e.*, (1) whether or not Mark Gannon is the real party in interest; and (2) whether or not Britton is entitled to relief on account of alleged extrinsic fraud practiced on him by petitioner's brother who is alleged to be the real party in interest; then even though petitioner is successful in such retrial on the merits, there is serious danger that he may lose substantial rights that are now being safeguarded by the suit in the nature of a creditor's bill, now pending in the United States District Court for the Eastern District of Oklahoma, and that such rights, once lost, cannot thereafter be recovered or enforced.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, to review the decision and opinion of the Supreme Court of the State of Oklahoma, in the case of W. R. Britton, Plaintiff in Error, v. Mark Gannon, Defendant in

Error, No. 36249, and that the questions therein involved be determined by this Court, as provided by law; that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the Supreme Court of the State of Oklahoma be reversed by this Honorable Court.

Respectfully submitted,

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